possibility that there may be some reasonable expectations which are not 'legitimate' has emerged with the extension of the concept of legitimate expectation into areas other than procedural fairness; for example, standing to bring an application for judicial review (see *Re Findlay*,[14] a case on parole policy).

Now, in the area of employment, the concept of legitimate expectation is elusive at least where used in relation to the expectation of promotion (see *Hamblin* v *Duffy (No 2)*[15] at p 304). Indeed, it has been held that the decision of a health authority not to appoint to the post of consultant orthopaedic surgeon a candidate recommended by the advisory appointment committee was not justiciable at all and so not susceptible of judicial review (see *R* v *Trent Regional Health Authority, ex p Jones*[16]).

More to the point, the reluctance of courts to interfere in all matters concerning the domestic affairs and internal management of a university stems from their enthusiasm for the jurisdiction of the university visitor (equivalent in this country to that of vice-chancellor) in such matters (see *Patel* v *University of Bradford Senate*[17] at pp 1499-1500). The English courts have continued to assert the exclusivity of the university visitor's jurisdiction (*Glynn* v *Keele University*[18]), and even to enlarge it (*Patel's* case[17]).

Thus, in the present case, the question whether the applicant should have been reappointed dean following the expiry of his term, by the vice-chancellor pursuant to the powers conferred by s 18 of the Constitution was exclusively a domestic matter involving academic judgment, to be resolved internally. No economic loss, social stigma, difficulty in securing future employment or dislocation was involved in the vice-chancellor's decision declining to reappoint the applicant dean. In such circumstances, I regarded the applicant as having no more than a pious 'hope' of being reappointed dean; 'nothing was being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges' (see *McInnes* v *Onslow-Fane*[12] at pp 1529-30) and also, *Paterson* v *Dunedin City Council*[19] where the width of the discretion defeated any legitimate expectation).

Accordingly, it was manifestly clear that the issues arising upon this application were not justiciable and so this court had no jurisdiction to grant the relief sought therein.

By way of postlude, I would add that I had considered the question whether if, contrary to my primary opinion, the applicant had a legitimate expectation of a hearing, his alleged previous misconduct hereinbefore mentioned, might be relevant. So, for example, in *Cinnamond* v *BAA*[20] misconduct on the part of hire-car drivers absolved the relevant public authority from observing natural justice when banning the drivers from operating at the airport. Brandon LJ in that case made it clear that no prejudice was suffered by the plaintiffs by the lack of a hearing, as the opportunity 'would have availed (them) nothing'. But, at the end of the day, I did not think it would have been fair to place any reliance on this particular ground considering that the application before me was only for leave. I accordingly wholly disregarded it when arriving at my decision.

In all the circumstances, the application was dismissed and with costs.

Application dismissed.

Solicitors: *Darshan Singh & Co; Presgrave & Matthews.*

Reported by *Zarinah Marican*

Saw Gaik Beow v Cheong Yew Weng & Ors

HIGH COURT (PENANG) - CIVIL SUIT NO 571 OF 1978
EDGAR JOSEPH JR J
6 JUNE 1989

Agency - Whether authority given for the execution of agreement - Evidence of circumstances

Contract - Sale and purchase agreement - Undue influence - Whether party was under undue influence - Circumstances surrounding the transaction - Contracts Act 1974, s 16

Civil Procedure - Limitation - Title to land - Accrual of cause of action - Clear and unequivocal threat to infringe right - When cause of action arose - Limitation Act, ss 6 & 9

Land Law - Sale and purchase agreement - Undue influence - Whether party was under undue influence - Circumstances surrounding the transaction - Contracts Act 1974, s 16

The plaintiff was a purchaser of a property and sued for specific performance of an agreement of sale and purchase contained in and constituted by a memorandum in writing by the first defendant. The registered proprietors were in fact the second and third defendants who are the son and daughter of the first defendant. The first defendant admitted that he signed the agreement but alleged that he did not give free consent as he was exposed to influence from the plaintiff who was his spiritual adviser. The second and third defendants took the position that they neither knew or approved of the agreement at the time of its execution by the first defendant nor did they subsequently ratify the same.

According to the plaintiff, the first defendant suggested in 1964 to the plaintiff that she buys a house in the town area. He offered to sell her the house and she could pay whenever able. A price of $22,000 was mentioned and she accepted. Subsequently, she together with DW2 (whom she later married) paid the first defendant a sum of $1,700 in the presence of the second and third defendants, and the first defendant acknowledged the same in his own handwriting. Numerous payments were then made by the plaintiff who moved into the house in May 1964, and each

time the first defendant acknowledged the same. Sometime in 1972, the plaintiff wished to settle the balance and it was then that the plaintiff first discovered that the property was registered in the name of the second and third defendants. They refused to execute a transfer and the plaintiff consulted her solicitors who sent a formal demand in 1976. No satisfactory response was made and the plaintiff caused to be issued the writ in 1978.

The first defendant alleged that the plaintiff urged him to persuade the second and third defendants to sell the property to her and if successful, he and his family would be blessed with good health and prosperity; if not, he would suffer dire consequences. The plaintiff paid him $1,700 and brought two exercise books to record the contents from a piece of paper written by the plaintiff's friend. Further, he alleged that the plaintiff was told by him that he was not the owner but the plaintiff threatened that if he did not persuade the second and third defendants to sell the property, he would be responsible for all dire consequences. Under these circumstances, he had no choice but to sign on the exercise book. This was not disclosed to his children. Subsequently, the first defendant pressed the plaintiff for further payments to which the plaintiff replied that she needed time to sell off the family estate. He further alleged that the plaintiff requested that the property be rented out to her.

Held, allowing the plaintiff's claim:

(1) The defendants appear to be a closely knit family and completely devoted to each other and lived together for many years. They were the sort of family who would have confided in each other regarding any matter of importance and of common interest. To say that in signing the agreement, the first defendant did so without the authority express or implied of the second and third defendants is something which strains credibility to such an extent that such an assertion is false and untrue.

(2) The first defendant's conduct was hardly that of a victim of the plaintiff's undue influence. He is an educated man and the agreement was in his clear and firm personal handwriting and is hardly consistent with the state of affairs as he alleged. Further, he took no steps to repudiate the agreement notwithstanding that the instalment payments continued for a very considerable period of time and if there was undue influence, such influence could not have persisted for so many years. There was also no allegation of undue influence by his solicitors when the plaintiff's solicitors called for a date for completion.

(3) The plaintiff's evidence that all the defendants were present when the agreement was signed was accepted and thus it was binding upon the second and third defendants for it was signed by the first defendant as their duly authorized agent.

(4) Only in exceptional circumstances will the equitable remedy of setting aside a transaction on grounds of undue influence be granted. Courts are not inclined to intervene even if the bargain may appear harsh, unless it can also be demonstrated that the transaction was to the manifest disadvantage of the person subjected to the dominating influence.

(5) To rely on undue influence, the party must show that (a) the other party had the capacity to influence him; (b) the influence was exercised; (c) its exercise was undue; and (d) that its exercise brought about the transaction. None of these conditions were satisfied by the defence.

(6) In an action for specific performance of an agreement or for a declaration of title to land, it is essentially an action to recover land and for purposes of limitation, time runs from the date of any infringement or at least a clear and unequivocal threat to infringe that right. In this case, the cause of action accrued from the date of service (28 January 1972) of the letter by the second and third defendants' solicitors refusing the demand by the plaintiff calling for a transfer of the property. This refusal constituted evidence of the first clear unequivocal threat to infringe the plaintiff's title. As the writ was issued on 8 December 1978 and the period of limitation is 12 years by reason of s 9 of the Limitation Act, the action was commenced well within time.

[*Editorial Note*: The first defendant has appealed to the Supreme Court vide Civil Appeal No 02-253 of 1989. The second and third defendants appealed vide Civil Appeal No 02-250 of 1989.]

Cases referred to

1 *Poosathurai* v *Kannappa Chettiar & Ors* AIR 1920 PC 65 (refd)
2 *National Westminster Bank* v *Morgan* [1985] 1 All ER 821 (refd)
3 *Bank of Montreal* v *Stuart* [1911] AC 120 (refd)
4 *Poosathurai* v *Kannappa Chettiar* [1919] LR 47 Ind App 1 (refd)
5 *Ormes* v *Beadle* (1860) 2 Giff 166; 66 ER 70 (refd)
6 *Bank of Credit & Commerce & Anor* v *Aboody* [1989] 2 WLR 759 (refd)
7 *Nadefinco Ltd* v *Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 (distd)
8 *Loh Wai Lian* v *Sea Housing Corporation Sdn Bhd* [1984] 2 MLJ 280 (distd)
9 *Read* v *Brown* (1888) 22 QBD 128 (refd)
10 *Reeves* v *Butcher* [1891] 2 QB 509 (refd)
11 *Gibbs* v *Guild* (1881) 8 QBD 296 (refd)
12 *Bolo* v *Koklan* AIR 1930 PC 270 (refd)
13 *Nasri* v *Mesah* [1971] 1 MLJ 32 (refd)
14 *Ahmad bin Hussin* v *Hajjah Mek bte Haji Hussain* [1973] 1 MLJ 18 (refd)
15 *Ng Moh* v *Tan Bok Kim & Anor* [1969] 1 MLJ 46 (refd)
16 *Lek* v *Mathews* [1926] 25 Ll L Rep 525

Legislation referred to

Contracts Act 1974 s 16
Limitation Act ss 6, 9

Darshan Singh Khaira for the plaintiff.
Ho Sen Feek for the first defendant.
Tan Beng Hong for the second and third defendants.

Cur Adv Vult

Edgar Joseph Jr J: This is a purchaser's action for specific performance of an agreement of sale and purchase contained in and constituted by a memorandum in writing dated 2 April 1964 ('the agreement') wherein the first defendant representing himself to be the owner of a dwelling house known as 11-A, Taman Perak, Penang, and the land on which it stands ('the disputed property') had agreed to sell the same to the plaintiff at a price of $22,000.

It would be useful if, without further ado, I reproduce the agreement, which incidentally, was made out in the personal handwriting of the first defendant, the script being both perfectly legible and firmly written, perhaps

understandably so, since he is a retired English school teacher. It was as follows:

> I, Cheong Yew Weng received from Madam Saw Gaik Beow the sum of dollars one thousand seven hundred only ($1,700) as initial payment for the purchase of house No 11A Taman Perak off Pesiran Perak, which I have purchased from the Borneo Building Society and which is made in my name and I will acknowledge future payments of any amount periodically until the full cost of the house which is dollars twenty-two thousand only ($22,000) is fully paid up, then the above house will be transferred to the said Saw Gaik Beow.
>
> Signed,
> Cheong Yew Weng
>
> One copy of the above statement to each.

At the foot of the agreement, were a number of endorsements, all in the personal handwriting of the first defendant, as follows:

> Received the under-mentioned payments from Mdm Saw Gaik Beow
>
> Payments

Date	Amount in words	Recipients' Signature
2 April 1964	Initial payment of dollars one thousand seven hundred only ($1,700)	Cheong Yew Weng
21 May 1964	Received three hundred dollars only ($300)	Cheong Yew Weng
2 July 1964	Received dollars one hundred and twenty eight and cts ten only ($128.10)	Cheong Yew Weng
1 August 1964	Received dollars one hundred and twenty eight and cts ten only ($128.10)	Cheong Yew Weng
3 September 1964	Received dollars one hundred and twenty eight and cts ten only ($128.10)	Cheong Yew Weng
	B/d Total	$2,384.30

Pausing there for a moment, three observations deserve mention: first, the transfer of the disputed property was subject to payment of the balance of $20,300 but no date was specified as to when this was to be; second, although the first defendant represented that the disputed property was in his own name, in fact, unbeknown to the plaintiff then, the registered proprietors thereof were the second and third defendants, the son and daughter of the first defendant, respectively; third, at the time of execution of the agreement and indeed even now, the disputed property is subject to a charge in favour of the Malaysia Borneo Building Society, Penang, ('the MBBS') to secure repayment of a loan at interest repayable by instalments of $128 pm.

In these circumstances, the second and third defendants have taken the position that as they neither knew nor approved of the agreement at the time of its execution by the first defendant nor, for that matter, as they never subsequently ratified the same, is it in any way binding upon them? As for the first defendant, he has taken the position that although he did sign the agreement, he did not give his free consent to the transaction, because he was exposed to such influence from the plaintiff, his spiritual adviser, as to deprive him of the free use of his judgment.

It is as well, if at this stage, I introduce the parties in this suit. The plaintiff, who neither reads nor writes English, is a fortune teller by occupation but denies that she is also a temple medium as alleged by the defence. In 1964, she was 45 years of age. She is of average intelligence and mental alertness having regard to her station in life. The first defendant is a retired normal-trained English school teacher having been attached to the Methodist Boy's School, Penang, and speaks fluent English. In 1964 he was 55 years of age. He struck me as intelligent and mentally alert having regard to his station in life with good powers of recall. He was also a careful witness who answered questions - especially under cross-examination - with due deliberation and in a perfectly composed manner. He impressed me as an individual with a strong personality and not one who was going to be brow-beaten or led by the nose however hectoring the cross-examination was going to be.

The second defendant, a son of the first defendant, is a clerk attached to the Lembaga Letrik Negara, Penang, and was, in 1964, 30 years of age and attached to the City Council, Penang, as a clerk. I consider him to be a witness of average intelligence and mental alertness having regard to his station in life.

The third defendant, a daughter of the first defendant, is a teacher and was, in 1964, 27 years of age. Although she was present in court she did not give evidence and so I had no means of assessing her personality or her intellectual content.

Both the second and third defendants are unmarried and, at all material times to this suit, have lived with the first defendant under the same roof. They were obviously a very closely-knit Straits-born middle class Chinese family and it was apparent that the second and third defendants were children with a strong sense of filial piety towards their father, the first defendant. It seemed to me that all three were completely devoted to each other.

It was common ground that the defendants came to know the plaintiff when they consulted her but there was an acute conflict of evidence as to why they did so.

The plaintiff's version was that she first came to know the three defendants when they called at her house at Paya Terbong and consulted her to have their fortunes read. This was a few years prior to 1964. Thereafter, she said the defendants visited her on numerous occasions for this purpose ending in the events which resulted in the execution of the agreement which I shall be examining in detail later on in this judgment.

The first defendant's version, on the other hand, was that sometime in 1963, he and one of his sons named Moe Choy (since deceased) were both sick but did not know what they were suffering from. Doctors qualified in Western medicine had treated them but without success. So they both went to the plaintiff's house in Paya Terbong and consulted her and were treated by her with some success.

I shall next touch on the events which occurred at these consultations as well as subsequent events, as to some of which, there was an acute conflict of evidence.

According to the plaintiff, sometime in March 1964, the first defendant visited her at home and himself suggested that she buy a house in the town area as this would save him the trouble of travelling all the way to Paya Terbong each time he wished to consult the plaintiff. But the plaintiff replied that she had no money, to which the first defendant replied that she need not worry as if he sold her a house she could pay whenever able. On hearing this, the plaintiff said that she accepted the offer. The first defendant then proceeded to say that he had two houses in the same row in Taman Perak and mentioned a price of $22,000. The plaintiff remarked that the price was high. But the first defendant replied that the plaintiff could pay him slowly and left.

Shortly thereafter, on 2 April 1964, the first defendant called at her house again and said that he wished to sell the disputed property and suggested that she called at his house later the same day and brought with her an initial payment of $1,700. The plaintiff agreed and did keep the appointment, being accompanied by her friend Goh Mun Jooi (DW2) (whom she later married) and bringing along with her a sum of $1,700 which she duly handed over to the first defendant who gave her an acknowledgment recorded in his own handwriting in an exercise book (p 1 AB1) being the agreement. The first defendant also made a corresponding entry in another exercise book which he retained for himself.

The plaintiff emphasized that at this meeting with the first defendant the other two defendants were also present. Indeed, the four of them, that is to say, the plaintiff and the three defendants were all seated at a table and discussed the mode of payment of the balance, the purchase price having been previously agreed at $22,000. It was agreed that the balance should be paid by monthly payment of such sums as the plaintiff could afford.

After the agreement was signed by the first defendant, Goh explained its contents to the plaintiff. This, as I have indicated, was in the first defendant's house and in the presence of the first, the second and the third defendants. However, at this point of time, the plaintiff had not seen the disputed property.

Later, in the first week of May 1964, the plaintiff met the first defendant at the disputed property and the latter handed her the keys to it. This was the first time the plaintiff saw the disputed property. The plaintiff then cleaned the disputed property and a few days after that moved into it.

On 21 May 1964, the plaintiff made a further payment of $300 to the first defendant towards the purchase price and thereafter she made 27 separate payments amounting to $3,193.90, each of which the first defendant duly acknowledged in the exercise book, P2, in his personal handwriting. At the same time, the first defendant made corresponding entries in his own exercise book which the plaintiff thumb-printed.

In addition, the plaintiff said that at the request of the first defendant, she also paid the quit rents and assessment rates on the disputed property and the instalments towards principal and interest due under the charge executed in favour of the MBBS. In all, the plaintiff had paid an aggregate sum of $12,751.80, towards the purchase of the disputed property and confirmed that the summary, P5, which reflected the payments made, was correct in every detail. She added that she held all the receipts for payment of the assessments, quit rents and instalments of principal and interest.

When, sometime in mid-1972, the plaintiff wished to settle the balance of the purchase price she thought that the first defendant was avoiding her. At this time, the plaintiff said that she had come to know that the disputed property was registered in the names of the second and the third defendants and she therefore queried the first defendant about this. The latter replied that she was not to worry because 'a coconut tree would not bear durians' which expression the plaintiff took to mean that the second and the third defendants would definitely do as instructed by their father. On hearing this, the plaintiff said she felt reassured.

However, the second and the third defendants did not agree to execute a transfer of the disputed property to the plaintiff and so the plaintiff consulted her solicitors who sent a formal notice in writing, dated 11 January 1976 being exh P8, addressed to the first defendant, calling upon him to nominate a date for execution of the transfer of the disputed property. There was no satisfactory response to this and hence the plaintiff caused to be issued the writ herein but only as late as 8 December 1978.

I must now turn to the defence version. Now, according to the first defendant who claimed that he was a devout and superstitious Buddhist, sometime in 1963, he first consulted the plaintiff about his own and his son Cheong Moe Choy's health problems, the cause of which he did not know. On this occasion, the first defendant said that the plaintiff went into a trance and, speaking in a strange voice, she told him and his son Moe Choy that the latter was in great danger as he had offended a spirit but that his (the first defendant's) condition was not serious.

The plaintiff then gave the first defendant and his son a glass containing 'holy water' and a talisman to be burnt and its ashes to be dissolved in water and drunk, which they did, and as a result, it was said that they both felt a marked improvement. Not unnaturally, the plaintiff won the trust and confidence of the first defendant, and this led to his regularly seeking the spiritual advice and guidance of the plaintiff in dealing with problems which arose in the course of his everyday life. The first defendant further testified that sometime towards the end of 1963 he consulted the plaintiff about his children's intended purchase of the disputed property; in particular, he sought the advice of the plaintiff about the 'Hong Sui' or geomancy of the disputed property. The plaintiff then prayed after which she told the first defendant that the disputed property was good.

However, a few moments later, the first defendant went on to allege - though this was denied by the plaintiff - that the god of 'Sam Poh', of which the plaintiff was an ardent devotee, liked the disputed property, and so the plaintiff wished to acquire it for her practice in town. Accordingly, the plaintiff urged the first defendant - and this too was denied by the plaintiff - to persuade the second and the third defendants to sell the disputed property to her and, if he succeeded in this, the first defendant and his family would be blessed with good health and prosperity; if not, the first defendant would suffer 'dire consequences'. The first defendant replied that he would have to think about it.

On a subsequent visit to the plaintiff's house, probably on 2 April 1964, the plaintiff 'expressed great keenness' in wanting to buy the disputed property and took out $1,700 in cash and handed it over to the first defendant for safekeeping. She added that once her family estate was sold she would have plenty of money and would then buy the disputed property. The first defendant then asked the plaintiff for a piece of paper on which to write a receipt but the plaintiff replied that would not do so she was illiterate and did not understand English. Instead, the plaintiff produced two exercise books and a piece of paper on which was written something in English and asked the first defendant to copy onto the exercise books the contents of the paper which had been written by her very close friend.

Upon reading the contents of the paper, the first defendant told the plaintiff that he was not the owner and could not therefore sell the disputed property but the plaintiff replied that he was not to be afraid and was only to help her. The plaintiff added that once she was in funds the first defendant was to persuade his children to sell the disputed property to her. The plaintiff threatened that if the first defendant did this good deed he would receive many blessings but if he did not he would be responsible for 'all dire consequences'. In the circumstances, the first defendant claimed that feeling that he had no choice he did as requested and signed on one of the exercise books (identified by him as P2) but did not date it. The plaintiff retained the exercise book P2 but gave the first defendant the other exercise book. The first defendant said that he had given this other exercise book to his former solicitor Mr Rajasingam but that the latter had not returned it to him although requested to do so in writing - see the letter dated 13 October 1981 being exh AB3 p 30. However, Mr Rajasingam had replied to this letter stating that all documents had been taken back by the first defendant (see p 33 AB3) though the latter denied this.

The first defendant maintained that he had signed the exercise book, P2, not in his house as alleged by the plaintiff, but in the plaintiff's house and, further, that when he did so, only the plaintiff was present, thereby denying the plaintiff's version that Goh (PW2) was also present. On returning home that day, the first defendant said that he told no one, either about the exercise book or the money - not even to his children.

On his own admission, the first defendant said that subsequent to signing the exercise book P2 he did not visit the plaintiff again but that since the plaintiff had not come up with a larger sum of money as promised he pressed her saying: 'You have not fulfilled your promise.' To which it was said the plaintiff replied that she needed more time to sell off the family estate. In the meanwhile, the first defendant alleged that the plaintiff had asked that the disputed property be rented out to her. At this point the first defendant replied that he would have to consult his children and having done so it was agreed on both sides that the rental be $128.10 pm and, in addition, the plaintiff was to pay the quit rent and assessment rates.

At first, the plaintiff paid the alleged rental to the first defendant and this was duly acknowledged by him on P2 up to December 1966 but, thereafter, because the plaintiff was not able to come up with the money to buy the disputed property, the first defendant claimed that he 'stopped taking rent'.

I must now proceed to an evaluation of the evidence.

I have already observed, when making my introductory remarks regarding the parties, that the defendants struck me as a closely-knit family who were completely devoted to each other. I would add that they have also

lived under the same roof for very many years. I am convinced that they were the sort of family who would have confided in each other regarding any matter of importance and of common interest, for example, a matter concerning the sale of a house belong to any of them. To say, therefore, that in signing the agreement, the first defendant did so without the authority express or implied of the second and the third defendants is to tell me something which strains credibility to such an extent that I must hold that such an assertion is false and untrue. To put it bluntly, I am more than satisfied that all three defendants were not only lying on this important aspect of the case but also not very clever at telling lies.

There were also several other unsatisfactory features in the case for the defence and I need no more than refer to the more obvious ones.

Firstly, when cross-examined by counsel for the second and the third defendants, the first defendant claimed that his children (the second and the third defendants) first came to know of the agreement only when the writ herein was served upon them - that would be in December 1978, *whereas*, when cross-examined by counsel for the plaintiff, he changed his tune and claimed that they first came to know of it as early as 5 January 1972, when, following 'a report by the plaintiff, the police picked up all three defendants for questioning.

Secondly, the first defendant claimed that he received the $1,700 from the plaintiff for safekeeping and that the agreement which he signed was intended as a receipt. Quite apart from the fact that nowhere in the agreement is there mention made of the money having been received for safekeeping, if the first defendant's version were true, it is not possible to account for the necessity of his retaining a copy of the agreement. But had the $1,700 been taken as a deposit to account of the purchase price, then such an act would have been natural.

Thirdly, the first defendant had testified in examination-in-chief, that when sometime after he had signed the agreement, the plaintiff did not come up with a large sum of money as promised, his reaction - to quote his own words - was: 'So, I pressed her. I said: 'You have not fulfilled your promise'. She asked for more time to sell off the family estate. Since she was anxious to move to town she asked me to let the house out to her. I told her I would have to consult my children.'

The first defendant's conduct was hardly that of a victim of the plaintiff's undue influence.

Fourthly, as to the subsequent payments received, the first defendant claimed that this was by way of rent, but of course, nowhere in the agreement was mention made of this fact. Instead, we find provisions appropriate to a sale. Bearing in mind that the first defendant is an educated person and the agreement was in his personal handwriting, is impossible to give the slightest credence to this explanation. Furthermore, if these payments were intended as rent, then I would expect them to be disclosed in the Income Tax Returns of the second and the third defendants but there was no evidence that this had been done.

Fifthly, the first defendant claimed that he had written the agreement on the instigation of the plaintiff and did so by merely copying out the writing appearing in a piece of paper handed to him by the plaintiff, alleging that he was then a victim of her undue influence. But the firm and clear handwriting of the first defendant appearing in the agreement is hardly consistent with such a state of affairs.

Sixthly, why if the defence version is true that when the first defendant 'executed the agreement he was the victim of undue influence exerted by the plaintiff were not steps taken, at least at a later stage, to repudiate it? Be it noted that the instalment payments which were thereafter made, continued for a very considerable period of time, ending more than six years later on 7 December 1971, yet, no attempt whatever had been made at repudiation. Surely, assuming for one moment and purely for the sake of argument, that the agreement was executed as a result of undue influence, such influence could not have persisted for so many years.

Seventhly, it is also of interest to note that the first defendant's solicitors' first reaction to the plaintiff's solicitors' letters of 11 January 1972 (exh P8) calling for a date for completion, was by letter dated 28 January 1972 (exh P9 p9 AB3) categorically denying the allegations therein relating to the agreement and contending that the disputed property had merely been let out to the plaintiff on a month to month basis. Significantly, not a word was mentioned about the first defendant having signed the agreement as a result of undue influence exerted by the plaintiff upon him. Nor, for that matter, did the defence attempt to call the solicitor who wrote the letter exh P9 to explain this glaring omission.

Accordingly, I am satisfied that the plaintiff's evidence that the agreement was signed at the first defendants' home at 1, Taman Perak, Penang, in the presence of the second and third defendants and her husband Mr Goh (PW2) is true. I also accept the plaintiff's evidence that before the agreement was signed by the first defendant, all the parties to this action, including the second and the third defendants, sat at a table and discussed its terms and were of one and the same mind; in other words, to use a familiar Latin tag, there was consensus ad idem. For the sake of completeness, I would go further and find that the agreement reflects and confirms what had been orally agreed by all the defendants. The agreement is thus binding upon the second and the third defendants even though they did not sign it, for it was signed by the first defendant as their duly authorized agent.

Why the second and third defendants did not sign the agreement since the disputed property was registered in their names and they were present at the time of its execution is a matter for speculation. But, it may be explained by the fact that the first defendant was the head of the family and by his dominant position in relation to the second and the third defendants. In any case, I would emphasize that I believe the plaintiff's version as to the circumstances under which the agreement came to be signed by the first defendant.

These findings must of necessity undermine the case advanced on behalf of the first defendant that he was induced into receiving the initial payment of $1,700 and signing the agreement by reason of undue influence exercised by the plaintiff over him so as to render the transaction void. I would go further and say that these findings put paid to the first defendant's defence that he did not give his free consent because he was exposed to such influence from the plaintiff, his so-called spiritual adviser.

I think this would be a convenient point for me to deal with the law on undue influence as defined in s 16 of the Contracts Act (Rev 1974). The provisions of that section are as follows:

> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; and
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.
>
> Nothing in this subsection shall affect the provisions of section 111 of the Evidence Act 1950.

Now, s 16 of our Contracts Act is in pari materia with the identically numbered section of the Indian Contracts Act.

In *Poosathurai* v *Kannappa Chettiar & Ors*,[1] Lord Shaw, speaking for their Lordships of the Board indicated that there was no difference on the subject of undue influence between the Indian Contracts Act 1872 and the English law. Accordingly, the general principles of equity as illustrated by English authorities would afford considerable assistance in resolving problems concerning undue influence in our courts.

In *National Westminster Bank* v *Morgan*,[2] the House of Lords held at p 827 h to i that:

> Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.

Lord Scarman referred to the principle justifying the court in setting aside a transaction for undue influence enunciated by Lindley LJ in *Allcard* v *Skinner* as not 'a vague policy' but specifically the victimization of one party by another. This is how Lindley LJ put it:

> The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded on the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. *Huguenin* v *Baseley* (1807) 14 Ves 273, (1803-13) All ER 1 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

The House then proceeded to follow the Privy Council cases of *Bank of Montreal* v *Stuart*[3] and *Poosathurai* v *Kannappa Chettiar*[4] and concluded at p 829 f to h:

> The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In *Poosathurai's* case the Board recognized that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence.

And, concluding with a word of warning, Lord Scarman speaking for the House said:

> There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable; this is a question which depends on the particular facts of the case.

Accordingly, it is, I think, not an unfair summary of the legal position to say that it is only in exceptional circumstances that the equitable remedy of setting aside a transaction on grounds of undue influence will be granted. So, even if a bargain may appear to be harsh, courts are not inclined to intervene unless it can also be demonstrated that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. The foundation of the principle to grant equitable relief of this kind is not inequality of bargaining power but the prevention of victimization by one party of another.

Lastly, the doctrine is not limited in its application to gifts but extends to commercial transactions as well; it could be a 'hard and inequitable' agreement (see *Ormes* v *Beadle*[5] at p 74) or 'unconscionable' in that it was a sale at an undervalue (see *Poosathurai* v *Kannappa Chettiar*[4] at pp 3-4).

Applying the principles enunciated above, to my findings of fact aforesaid, I am completely convinced that the transaction concerned was not unfair to the defendants. Upon my interpretation of the facts, there was no evidence that the transaction itself was 'wrongful in that it constituted an advantage taken of the person subjected to the influence, which failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.'

Looking back, quite apart from the question of manifest disadvantage, a party relying on the plea of undue influence would have to show that (a) the other party had the capacity to influence him, (b) the influence was exercised, (c) its exercise was undue and (d) that its exercise brought about the transaction (see *Bank of Credit & Commerce & Anor* v *Aboody*[6]). Upon the evidence before me, I have already stated why I am also convinced that none of these conditions was satisfied by the defence. Accordingly, the plea of undue influence fails and I next consider the defence of limitation.

In the present case, I have already observed that the agreement was silent as to the date by which the balance of the purchase price had to be paid. But, the evidence disclosed that as at 7 December 1971 the plaintiff had paid a total sum of $12,751.80 leaving a balance of $9,248.20 and that on that date a last instalment payment of $128 had been made to the MBBS. Moreover, the plaintiff had been given vacant possession of the disputed property. The plaintiff's then solicitors, by a letter dated 11 January 1972 with copies to the second and third defendants, called upon the first defendant to give an early date when the balance of the purchase price could be paid and a transfer, free of the charge in favour of the MBBS executed. However, the second and the third defendants refused to do so.

Upon these facts, counsel for the first defendant had argued, relying upon *Nadefinco Ltd* v *Kevin Corporation Sdn Bhd*[7] and *Loh Wai Lian* v *Sea Housing Corporation Sdn Bhd*,[8] that the plaintiff's cause of action accrued on 7 January 1972, that is to say, one month after the due date of the last instalment to the MBBS, that being a reasonable time allowed for successive instalment payments by the plaintiffs, having regard to the general pattern of instalments payments from 2 April 1964 to 7 December 1971.

Accordingly, as the writ herein was issued on 1 December 1978, and the period of limitation being six years by reason of s 6 of the Limitation Act, the plaintiff's claim was barred.

I regret I find counsel's submission totally unacceptable. Both *Nadefinco's* case[7] and *Loh Wai Lian's* case[8] are readily distinguishable.

In the first of these cases, the action was not for recovery of land but for recovery of tribute money under a lease fortified by a guarantee. The relevant section was therefore not s 9 but s 6 of the Limitation Act and so it was held that the cause of action accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, it having been commenced more than six years after the cause of action arose.

In the second case, the purchaser of a house under a sale and purchase agreement sued the vendor developer for liquidated damages for delay in the completion of a shophouse under the sale and purchase agreement and the issue was whether the action was barred by s 6 of the Limitation Act. It was held that the trial judge was right in holding that the cause of action was founded on a breach of contract. That being so, the breach committed by the defendant was in failing to complete and to give vacant possession of the shophouse within 18 months of the date of agreement as stipulated therein. Accordingly, the action was founded on contract and not on any other right; so the cause of action accrued on the date of the breach.

Having said that I must now refer to other authorities which seems to me apposite to this case.

In *Read* v *Brown*,[9] Lord Esher MR defined 'cause of

action' as the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.

In *Reeves* v *Butcher*,[10] Lindley LJ said:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v *Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

It is elementary that in the case of actions founded on contract time runs from the date of breach (see *Gibbs* v *Guild*[11] at p 302). But, in the case of actions founded on any other right time runs from the date on which that right is infringed or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (see *Bolo* v *Koklan*[12]).

Now, there is authority for saying that whether an action is for specific performance of an agreement or for a declaration of title to land, it is essentially an action to recover land and for purposes of limitation time runs from the date of any infringement or at least a clear and unequivocal threat to infringe that right (see *Nasri* v *Mesah*;[13] *Ahmad bin Hussin* v *Hajjah Mek bte Haji Hussain*[14]).

In the present case, the plaintiff had paid a substantial part of the purchase price and had gone into possession. The last instalment paid towards the purchase price was, as I have said, the sum of $128 on 7 December 1971. Then, by a letter dated 11 January 1972 the plaintiff's solicitors had written to the first defendant, with copies extended to the second and the third defendants, stating that the plaintiff was ready, able and willing to pay the balance of the purchase price and accordingly calling upon the first defendant to specify an early date when the balance could be paid and a transfer of the disputed property free of the charge in favour of the MBBS executed by the second and the third defendants in favour of the plaintiff.

However, the solicitors for the second and the third defendants replied by letter dated 28 January 1972 (exh P15) stating that their clients were the registered proprietors of the disputed property and that they had never at any time authorized their father the first defendant to sell the disputed property as alleged or at all, and further, that they had never at any time been privy thereto. Additionally, it was said that the first defendant had merely let out the disputed property on their clients' behalf to the plaintiff who was by then in arrear with payment of his rent.

In my opinion, the cause of action in this case accrued from the date of the service of the letter P15 refusing the demand made by the plaintiff's solicitors, contained in their letter, P8, calling for a transfer of the disputed property. This refusal, in my view, constituted evidence of the first clear unequivocal threat to infringe the plaintiff's title (see *Ng Moh* v *Tan Bok Kim and Anor*[15]). As the writ in this case was issued on 8 December 1978 and the period of limitation applicable being 12 years by reason of s 9 of the Limitation Act and not six years by reason of s 6, the action was commenced well within time and the plea of limitation accordingly fails.

Before I pass on to pronouncing the orders consequent upon my conclusions aforesaid, I have some general observations to make.

It is obvious from this judgment that my decision, so far as the factual issues were concerned, turned upon my assessment of the credibility of the parties and their witnesses. However, in arriving at my findings as to credibility, I kept very much in the forefront of my mind the wise advice of Mr Justice MacKenna which appears in a paper entitled 'Discretion' read at the University College, Dublin, on 21 February 1973, printed in the Irish Jurist, Vol IX, new series, p 1, namely:

> This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by the independent witnesses ... I judge a witness to be unreliable if his evidence is in a serious respect, inconsistent with these undisputed or indisputable facts, or of course, if he contradicts himself on important points. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendants.

And, in *Lek* v *Mathews*[16] at p 543, Atkin LJ said:

> I fully appreciate that the trial judge has advantages in seeing the witnesses. For myself, after a considerable personal experience of seeing witnesses, I think those advantages are often exaggerated. I would attach much more importance to the intrinsic value of the evidence, its relation to other facts clearly proved or admitted, than to the demeanour of the witness. I have known witnesses of truth with the demeanour of equivocation, and witnesses of untruth with the demeanour of righteousness ...
>
> The lynx-eyed judges who can discern the truthteller from the liar by looking at him is more often found in fiction or in appellate judgments than on the Bench. But I recognize that shorthand notes do not always tell the whole story as presented to the tribunal of first instance and I have taken that into account.

In all the circumstances, I would enter judgment for the plaintiffs as follows:

(1) that this court doth declare that the agreement made between the plaintiff of the one part and the first defendant of the other part constituted an agreement binding upon the second and the third defendants;

(2) that upon payment of the balance of the purchase price, less real property gains tax (if any), into court within 14 days from date hereof by the plaintiff, the agreement be specifically performed and carried into execution by the second and the third defendants

executing a valid and registrable transfer of the disputed property free from all encumbrances to the plaintiff or her nominee and failing their doing so, then the senior assistant registrar of this court be authorized to do so on their behalf;

(3) that upon payment of the balance of the purchase price as aforesaid, the second and the third defendants do deliver or cause to be delivered to the plaintiff or her solicitors the issue document of title relating to the disputed property;

(4) that the costs of this action be paid by the defendants to the plaintiff.

Order accordingly.

Solicitors: *Darshan Singh & Co, Gan Teik Chee & Ho; Tan Beng Hong & Co.*

Reported by *Yap Shao Sin*

Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd

HIGH COURT (JOHORE BAHRU) - ORIGINATING SUMMONS NO 116 OF 1982
LC VOHRAH J
1 JUNE 1989

Land Law - Foreclosure - Third party charge - Non-payment of loan - Borrower went into liquidation - Defendant chargor resisting foreclosure - Whether charge bad for failure of consideration - Whether charge void for past consideration - Whether Form 16E correct statutory notice - National Land Code, ss 255, 256 & 257.

This is an application by the plaintiff under s 256 of the National Land Code 1965 ('the Code') for 11 pieces of land belonging to the defendant and charged to the plaintiff to be sold for non-payment of a loan granted to a third party. The plaintiff granted a loan of $3,000,000 to Mosbert Finance (Hong Kong) Limited known subsequently as Mosbert Acceptance Limited ('Mosbert') on the security of the said 11 pieces of land. Mosbert defaulted in repaying the loan and eventually went into liquidation. In consequence the plaintiff through its solicitors sent out a statutory demand in Form 16E pursuant to s 55 of the Code but no repayment was made. The loan was actually granted to Mosbert in five instalments in 1972 between 8 September and 11 October. By a resolution passed on 30 August 1972 the defendant decided to charge the said pieces of land to the plaintiff. The charge was executed on 11 January 1973 in favour of the plaintiff after the said pieces of land which were charged to Public Finance Bhd had been discharged. Five issues have been identified by counsel for the defendant for the consideration of the court:

(1) whether the said pieces of land charged can be foreclosed to recover sums allegedly paid to Mosbert;
(2) whether the charge is bad for a failure of consideration;
(3) whether the charge is void for past consideration if it covers loans given to Mosbert;
(4) whether the statutory notice in Form 16E was the correct one to have been used; and
(5) whether interest at the rate claimed is recoverable after 20 February 1976 or 24 May 1976 as the case may be.

Held, allowing the application:

(1) With regard to the first three issues, the learned judge found that the annexure to the charge forms an integral part of the charge. From the provisions of the annexure and the surrounding circumstances it is clear that the defendant agreed to create the charge in order to secure the loan that was to be granted to Mosbert by the plaintiff. It is also clear that the defendant must have executed the charge on 11 January 1973 pursuant to the directors' resolution passed on 30 August 1972 to charge the said lands to the plaintiff to secure the loan in favour of Mosbert. The delay in the execution of the charge was explained by the undisputed fact that the said pieces of land at the material time were still charged to Public Finance and had to be discharged before they could be recharged to the plaintiff. It is obvious therefore that although the five instalments of the loan were granted to Mosbert before the charge was formally executed on 11 January 1973 and registered on 10 April 1973 the charge was in fact agreed to be created for the specific purpose of securing the loan for the benefit of Mosbert, the principal debtor, before any part of the loan was released. The charge is accordingly not void merely because the sums were actually paid to Mosbert although the charge itself described the receipt of the loan sum to have been acknowledged by the defendant. There was no failure of consideration.

(2) Although cl 1 of the charge annexure provided for the repayment of the loan within one year, that fact alone did not make the facility a term loan as such. When that period elapsed the plaintiff was entitled to avail itself of cl 2 which imposed an obligation on the defendant to pay the plaintiff on demand. The two clauses do not contradict but complement each other. They operated to allow repayment within one year subject to the bank's overriding right to demand repayment at any time. Accordingly it was in order for the plaintiff to have used Form 16E in this case.

(3) With regard to the issue of interest, no notice of variation of interest was sent either to the defendant or Mosbert. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1976 was given, Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation of interest had been sent either to Mosbert or the defendant. In the absence of fraud, by virtue of cl 2 of the charge annexure which stated 'the statement of the manager assistant manager sub manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive', the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

(4) As the total amount due to the plaintiff was not available on that day the learned judge adjourned the matter for the making of the appropriate order for sale under s 257(1).

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-238 of 1989.]

Cases referred to

1 *Chai Yen* v *Bank of America National Trust & Savings Association* [1981] 2 MLJ 141 (refd)
2 *Co-operative Central Bank Limited* v *G Visvanathan s/o Govindasamy & Ors* [1987] 1 CLJ 390 (refd)